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No. 88-752

In The

Supreme Court of the United States

October Term, 1988

ROGER MARTIN,

Petitioner,

v.

ALBERT LEE WALKER, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that a federal district court may properly deny a summary judgment motion regarding a claim of qualified immunity based upon inferences drawn from a police report submitted and relied upon by the party seeking immunity when the report may have contained inadmissable hearsay.

PARTIES IN THE COURT BELOW

The petitioner appeared as the sole appellant in the court below.

The respondents appeared in the court below as appellees. Although Albert Lee Walker was named as the sole respondent in the petition, the following parties to the decision below also wish to appear as respondents in this matter: Judith Walker, William J. Walker, Laura Christine Walker, Tonya Faye Walker, and Tanya Renee Walker.

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OPINIONS BELOW

The June 27, 1988, opinion of the court of appeals (Pet. App. 2-6) affirming the district court's denial of summary judgment is reported at 850 F.2d 433. The court of appeals' order denying petitioner's motion for rehearing and suggestion for rehearing en banc (Pet. App. 1) is unreported. The original September 15, 1986, order of the district court (Pet. App. 17), the November 24, 1987, order of the court of appeals remanding the case for further findings (Pet. App. 13-14), and the district court's January

25, 1988, supplemental order (Pet. App. 7-12) are all unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 27, 1988. Petitioner's request for rehearing was denied on August 12, 1988. The petition for a writ of certiorari was filed on November 3, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1982).

STATEMENT OF THE CASE

1. On October 17, 1984, respondents filed the present action in the United States District Court for the Southern District of Iowa. This action was brought, in part, under 42 U.S.C. § 1983 (1982).

This action arose out of an incident which occured on June 3, 1984.* On that date, petitioner Martin saw respondent Albert Walker operating a car in a reckless manner. After witnessing respondent's reckless driving, petitioner drove his patrol car to respondent's home, where he confronted respondent in his front yard.

During that confrontation, a fight broke out between petitioner and respondent in which petitioner hit respondent with his sap injuring him. Respondent Judith Walker, Albert Walker's wife, helped break up the fight

*A detailed summary of the facts in this case with citations to the record is contained in the Appellees' Brief and Argument filed in the court of appeals at pages 2-4.

by taking the sap away from petitioner. At that time, she told petitioner to call for another police officer.

Petitioner told respondent that he was under arrest. Respondent said "no I ain't, you ain't takin me to jail." With that, respondent walked to his pickup truck and entered the cab. Before respondent could start the pickup, his wife took the keys away from him and told him to calm down. While she was talking with respondent Albert Walker, petitioner went to his patrol car and radioed for further assistance. He then drove the patrol car behind respondent's pickup and got out with a 12 gauge shotgun. Petitioner inserted a shell in the chamber of the gun and ordered respondent out of his pickup.

In response to petitioner's order, respondent got out of the pickup and began walking towards petitioner. As he walked towards petitioner, respondent raised his hands in the air and said "go ahead and shoot me." Petitioner then fired the shotgun at respondent, hitting him in the chest and seriously wounding him.

At the time he was shot, respondent was unarmed. Petitioner had intended to arrest respondent for the misdemeanor offense of public intoxication.

2. On November 22, 1985, petitioner filed a motion for summary judgment. In the motion, petitioner alleged that he was entitled to summary judgment on his affirmative defense of qualified immunity.

In support of the motion for summary judgment, petitioner filed several affidavits. In addition, petitioner attached the report that the Iowa Division of Criminal Investigation ("DCI") compiled regarding the shooting to

his Statement of Material Facts as to Which No Genuine Controversy Exists. That report contained summaries of statements from a number of eye witnesses to the incident. Petitioner relied on statements in that report in arguing the qualified immunity issue before both the district court and the court of appeals and quoted several sections of the report in papers filed with those courts.

REASONS WHY THE PETITION SHOULD BE DENIED

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. In any event, the decision below turns on an interpretation of the rules associated with summary judgment motions which is of no general importance. Accordingly, review by this Court is not warranted.

1. The decision of the Eighth Circuit below turns solely upon an issue of summary judgment law (Pet. App. 2-6) which is of no general importance. In this case, petitioner submitted a police investigation report as part of his summary judgment motion and relied on that report to support the motion (Pet. App. 3). The Eighth Circuit held that in these circumstances, a district court may consider the contents of such a report in deciding a summary judgment motion, even if the report might otherwise contain inadmissible hearsay (Pet. App. 5-6).

Petitioner in filing his motion for summary judgment and including the DCI report with the motion did so without stating any limitations on the use of that report. Moreover, petitioner himself cited verbatim portions of

the DCI report to both the district court and the Eighth Circuit. *See, e.g.,* Defendant-Appellant, Roger Martin's Brief and Argument at 6, 12 (filed with 8th Circuit in November 1986); Defendants' Supplemental to Statement of Material Facts as to Which No Genuine Controversy Exists at 6 (filed with district court in February 1986). The lower courts impliedly held that petitioner's failure to raise any limitation or objection to use of the report allowed the district court to use the report to draw inferences favorable to the non-moving parties (*i.e.,* respondents).

That decision comports with the general law regarding waiver. *See, e.g., Dautremont v. Broadlawns Hosp.,* 827 F.2d 291, 294-95 (8th Cir. 1987) (failure to raise objections to summary judgment materials waives any defects); *Williamson v. United States Dep't of Agriculture,* 815 F.2d 368, 383 (5th Cir. 1987) (waiver principles help prevent party from sandbagging district court); *Chambers v. United States,* 357 F.2d 224, 229 (8th Cir. 1966) (failure to object held to be waiver, since other party not afforded opportunity to correct any technical defects). In addition, the decision comports with the general principle of summary judgment law that all inferences from materials before the court deciding a summary judgment motion are to be interpreted in the light most favorable to the non-moving party. *See, e.g., Matsushita Electric Indust. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986). The decision below, therefore, was correct. *See also Poe v. Haydon,* 853 F.2d 418, 426 (6th Cir. 1988) (summary judgment inappropriate if "it cannot be determined before trial whether the defendant did acts that violate clearly established rights").

Although the decision below was based solely on an analysis of summary judgment law relating to documents which may have hearsay problems, the petition did not even mention the hearsay aspect of the opinion below until the concluding sentence of the Argument section. Because that opinion dealt with a narrow question of summary judgment law, rather than the qualified immunity issues raised by the petition, the petition improperly focuses the Court's attention on an issue not decided by either court below. The petition should, therefore, be denied.

2. Petitioner argues that there is a sharp division among the various courts of appeals concerning how qualified immunity should be analyzed when a subjective element forms part of the underlying consitutional violation (Pet. 9-14). While this Court has not given explicit guidance on that question, it has indicated that "government officials performing discretionary functions [will have] a qualified immunity [which] shield[s] them from civil damages liability as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated." *Anderson v. Creighton*, 483 U.S. ___, 107 S.Ct. 3034, 3038 (1987). *See also Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Moreover, "the defendant is entitled to summary judgment [on the qualified immunity issue] if discovery fails to uncover evidence sufficient to generate a genuine issue as to whether the defendant in fact committed" acts which violated clearly established law. *Anderson*, 107 S. Ct. at 2816. Here, however, petitioner has failed to demonstrate that he is entitled to immunity or that the decision below conflicts with the decisions of the other courts of appeals.

The district court found that portions of the DCI report contained in petitioner's summary judgment motion indicated that there was a genuine issue of material fact (Pet. App. 12). Specifically, the district court cited portions of the record indicating that there was a factual dispute regarding respondent Albert Walker's actions just prior to the shooting. For example, the district court cited the following passage from the DCI report to support its conclusion:

> JUDY WALKER advised that AL got out of the truck and started walking back towards ROGER and he had his hands up and out to the side. She stated ALBERT said, "you can shoot me if you want to" and he shot him and AL fell down.

See Pet. App. 10. This statement contrasts materially with petitioner's alleged version of the incident. In the petition, petitioner described the same incident as follows:

> When Walker exited the truck, he advanced quickly towards Martin and yelled, "I am going to kill you". Martin ordered Walker to halt two or three times, but when he did not, shot Walker once, fearing for his life if the two fought again and Walker was able to gain control of his shotgun.

Pet. 4.

The two versions set up factual questions which are intertwined and relate to the question of qualified immunity. In determining whether there was a clearly established constitutional norm against shooting respondent, a trier of fact must determine which version of the facts is correct. *Cf. Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986) ("at the summary judgment stage the judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine

whether there is a genuine issue for trial"). While the constitutional violation alleged in the complaint may not have been "clearly established" if respondent was hurrying towards petitioner yelling "I am going to kill you", there can be no doubt that "clearly established" law prohibited petitioner from shooting respondent, when respondent was slowly advancing towards petitioner, had his arms extended out to his side, and carried no weapon. *See, e.g., Wing v. Britton*, 748 F.2d 494, 497 (8th Cir. 1984).

Petitioner had the burden to demonstrate in his summary judgment motion that there was no genuine issue of material fact regarding the surrounding circumstances to the shooting which indicated that he was entitled to qualified immunity under the *Harlow* doctrine. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). He failed to do so. As a result, this case does not pose a significantly important question nor does the opinion below demonstrate how this case has created a split among the courts of appeals regarding any signifcant issue.

CONCLUSION

The Petition for a writ of certiorari should be denied.

Respectfully submitted,

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